No. 75-94

Supreme Court, U.S.
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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1975

EDDIE MACIEO BREWER, PETITIONER

v.

United STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court improperly instructed the jury concerning the weight to be given the testimony of an accomplice and erred in ordering the jury to disregard certain remarks by defense counsel during closing argument.

After a joint jury trial with co-defendant Pete Mathews in the United States District Court for the Central District of California, petitioner was convicted of having conspired with Mathews and Charles Casteel to distribute 183 grams of heroin, in violation of 21 U.S.C. 846 (count 1), possessed the heroin with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1) (count 2), distributed the heroin, in violation of 21 U.S.C. 841(a)(1) (count 3), and aided and abetted Casteel in distributing it, in violation of 18 U.S.C. 2 (count 4). He received concurrent sentences of ten years' imprisonment to be followed by a three-year

special parole term.[1] The court of appeals affirmed (Pet. App. A).

At trial, the evidence showed that on May 9, 1974, Drug Enforcement Administration Agent Roger Johnson, working undercover, arranged by telephone to purchase five ounces (approximately 183 grams) of heroin from co-conspirator Casteel (Tr. 175-176). Casteel instructed Johnson to meet him at a location in Lawndale, California, which he indicated was near the residence of his source of heroin (Tr. 23-24, 180-181). Agent Johnson went to the specified location with undercover officer Percy Perrodin of the local police, and Casteel arrived shortly thereafter. After making a telephone call, Casteel told the officers that his "people" were at their other residence in Inglewood, California (*ibid.*).

The officers accompanied Casteel to a drive-in restaurant in Inglewood and waited while Casteel went to contact his source of heroin. Upon returning, Casteel told the officers that his "people" wanted to be present when the drug was delivered. He then departed a second time, with Agent Johnson and officer Perrodin again remaining at the restaurant (Tr. 181-182, 224). Other federal and state officers, who were maintaining surveillance outside the restaurant, followed Casteel to a nearby building in which co-defendant Mathews rented an apartment. Casteel entered and soon emerged accompanied by petitioner and Mathews. As the officers watched, Casteel drove towards the restaurant, followed by petitioner and Mathews in another car (Tr. 191-192, 211, 261-264).

[1]Co-defendant Mathews was also convicted on all four counts. Originally indicted along with petitioner, Casteel pleaded guilty to a superceding information charging possession of the heroin, in violation of 21 U.S.C. 844, and testified for the government at petitioner's trial.

Casteel returned to the restaurant, and petitioner and Mathews soon arrived there together. As petitioner and Mathews watched from inside the restaurant, Casteel handed officer Perrodin 183 grams of heroin in the parking lot. Petitioner, Mathews, and Casteel were all placed under arrest (Tr. 182-186, 190).

Officers went to Mathews' apartment where, after being admitted by Mathews' girl friend, they saw a piece of paper containing notations corresponding to the sale price per ounce ($1,150), the number of ounces sold (5), and the total price ($5,750) for the heroin transaction that had just occurred (Tr. 192-194).

Casteel testified for the government that Mathews was his immediate source for the heroin and that petitioner had delivered the heroin to Mathews shortly before the sale to the undercover officers (Tr. 76-80).

1. Petitioner's contention that the trial court improperly instructed the jury regarding the weight to be given the testimony of petitioner's accomplice, Casteel, is insubstantial. The court told the jury (Tr. 425-426):

> [I]f you reject all of Casteel's testimony the Government's case cannot stand; and if you find that Casteel did engage in the deliberate perjurious plan to escape punishment and to involve innocent persons as a means of escaping punishment you should have no hesitation in acquitting these defendants.
>
> If, on the other hand, you believe all or sufficient part of Casteel's testimony and you find that that testimony sufficiently is corroborated by other evidence to lead you to conclude that Casteel did indeed arrange for the delivery of the heroin through Brewer and Mathews, and that the essential elements of the crimes in these counts have been proved beyond a reasonable doubt you should not have any hesitancy in finding them guilty.

Later in the charge the court advised the jurors that they could disregard Casteel's testimony entirely if they found it to be false in part (Tr. 447) and cautioned them to scrutinize his testimony carefully, and especially to consider that Casteel had pleaded guilty to a misdemeanor that involved a much lesser penalty than did the crime with which he was originally charged (Tr. 449-450). Finally, the court instructed the jurors to consider whether any part of Casteel's testimony was corroborated by independent evidence (Tr. 450) and directed them, if they should find that Casteel was lying, to have no hesitation in acquitting the defendants (Tr. 451). Those instructions accurately stated the relevant legal principles.

2. Petitioner argues that the trial judge committed error of constitutional proportions in his responses to two statements by petitioner's counsel in closing argument.

a. As recounted in the opinion of the court of appeals (Pet. App. A), petitioner's counsel, in attacking Casteel's credibility, asked the jurors whether they would entrust personal decisions such as changing jobs, marriage, and divorce, to such a man (Tr. 426-427). Thereafter, the judge admonished the jury (Tr. 428); "Please, do not carry with you the idea that a Government witness must be the kind of person that was described yesterday in one of the summations." The trial court's comment properly corrected the erroneous test for evaluating the testimony of a government witness that defense counsel had suggested to the jury.[2]

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[2]While acknowledging that his attorney's remarks "may have been more properly phrased" (Pet. 9), petitioner erroneously attempts to import definitions of "reasonable doubt" into instructions concerning the weight to be given an accomplice's testimony.

b. The court also instructed the jury to disregard defense counsel's statement in closing argument that, after the indictment of petitioner and Casteel, "the Government had no case, and Mr. Casteel knew they had no case against either one of these defendants, I would respectfully submit, unless he were the one to testify against them" (Tr. 391).

The court of appeals correctly found no error. Pointing out that there was no support in the record for counsel's remark that Casteel knew the prosecution had no case without his testimony (Pet. App. 2), the court held that the trial court properly instructed the jury to disregard it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
SEPTEMBER 1975.